Docket No. 92-1185

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

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NELSON NAVARRO,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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## QUESTIONS PRESENTED FOR REVIEW

Whether the quantity of controlled substances set forth in an indictment charging conspiracy to violate 21 USC 841(b)(1)(A) must be proven beyond reasonable doubt to the finder of fact at trial.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The Petitioner, Nelson Navarro, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered August 11, 1992.

## OPINION BELOW AND JURISDICTIONAL STATEMENT

On August 11, 1992, the Court of Appeals entered an order (Docket NO. 92-1044) affirming the judgment of conviction rendered against petitioner in the United States District Court for the Southern District of New York. The opinion is unpublished and its text is reproduced in full in the Appendix hereto. Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. V:

No person shall . . . be deprived of life, liberty, or property without due process of law; . . . .

21 U.S.C. 841. Prohibited Acts A Unlawful Acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

* * *

Penalties

(b) Except as otherwise provided in Section 859, 860, or 861 or this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . . .

## STATEMENT OF THE CASE

Petitioner was tried upon an indictment which charged him with conspiring to possess heroin with intent to distribute in violation of 21 USC 812, 841(a)(1) and 841(b)(1)(A). Jurisdiction

in the United States District Court, Southern District of New York, was pursuant to 18 USC 3231. The indictment mistakenly charged that in excess of one kilogram was involved in the conspiracy; the actual amount adduced at trial was somewhat more than one-third kilogram.

Both sides moved to strike the reference to weight at the commencement of trial; the trial court reserved decision but ultimately charged the jury in the language of the indictment, including the erroneous weight reference.

Prior to the jury charge, defense counsel moved for what was called a trial order of dismissal (in effect, a motion for a judgment of acquittal pursuant to Rule 29), which motion was denied. Thereafter, the case was submitted to the jury under the language of the indictment,

including the incorrect weight reference. Neither party objected and petitioner was convicted of both the conspiracy count and a related substantive count as to which the trial court did not specify any particular weight.

Timely notice of appeal was filed. Jurisdiction in the Court of Appeals was pursuant to 28 USC 1291. On appeal to the Court of Appeals, petitioner argued, inter alia, that the conspiracy count was not supported by legally sufficient trial evidence because the one-kilogram conspiracy set forth in the indictment was not proven. In addressing the legal insufficiency question, the Court held:

> Proof of a particular quantity of narcotics is not an element of a Section 841(a) substantive charge or of a conspiracy charge under Section 846 of Title 21.

United States v. Macklin, 927 F.2d 1272, 1276, cert. denied, 112 S.Ct. 146 (1991); United States v. Campuzano, 905 F.2d 677, 679 (2d Cir.), cert. denied, 111 S.Ct. 363 (1990) (see Court's opinion at Appendix, p. 6).

## REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals raises the question of whether the quantities of controlled substances set forth in 21 USC 841 are, when set forth in an indictment, elements which must be proven beyond reasonable doubt or whether they merely relate to the penalties which must be imposed after conviction.

This question would turn on a review of the narcotics statute set forth in 21 USC 841 with reference to the standards set forth in McMillan v. Pennsylvania, 477 U.S. 79 (1986). In McMillan, this Court

stressed that the key to distinguishing between elements of the offense which must be proven beyond a reasonable doubt to the trier of fact and other "identified facts" left for the judge at sentencing, was the legislature's definition of the elements of the offense at issue. Id. McMillan thus instructs a reviewing court to look to the specific statute and its legislative history to resolve such claims. United States v. Wood, 834 F.2d 1382 (8th Cir. 1987).

This issue has been addressed by Circuit courts, United States v. Macklin, 927 F.2d 1272, 1276, cert. denied, 112 S.Ct. 146 (1991); United States v. Campuzano, 905 F.2d 677, 679 (2d Cir.), cert. denied, 111 S.Ct. 363 (1990), but apparently not by this Court. Accordingly, we seek certiorari review.

## CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari be granted.

Respectfully submitted,

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Dated: November 7, 1992

# APPENDIX

## TEXT OF OPINION OF COURT BELOW

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the eleventh day of August, one thousand nine hundred and ninety-two.

Present:

Honorable Ralph K. Winter,

Honorable Roger J. Miner,

Honorable Joseph M. McLaughlin

Circuit Judges.

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United States of America,
Appellee,

v.

ORDER
#92-1044

Nelson Navarro,
Defendant-Appellant.

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Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Nelson Navarro appeals from his conviction after a jury trial before Judge Duffy for conspiracy to possess heroin with the intent to distribute in violation of 21 U.S.C. §846 (1988), and for possession of heroin with the intent to distribute in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A) (1988), and

18 U.S.C. § 2 (1988). The district court's charge to the jury included language from the indictment that "[i]t was [an] object of the conspiracy . . . to distribute . . . one kilogram . . . of heroin." Navarro claims that the evidence on the conspiracy count was legally insufficient because less than one kilogram of heroin was involved. Alternatively, Navarro argues that a new trial is required because he was prejudiced by the jury charge and that the prejudice taints his conviction on the possession count. Each of these arguments is without merit.

Francisco Pena, an informant working for the Drug Enforcement Agency ("DEA") in Puerto Rico, testified that Navarro's mother approached him in March of 1991 and asked him to smuggle drugs from New York

City to Puerto Rico. She told Pena to obtain the narcotics from Navarro and supplied Pena with Navarro's Manhattan telephone number. Pena advised the DEA of the proposed scheme, which mounted an undercover operation. In the course of that operation, Navarro took Pena to his apartment where Pena observed plastic-wrapped packages that he believed contained narcotics. He relayed this information to the DEA, and a search warrant for Navarro's apartment was obtained. The search resulted in the seizure of over 8000 glassine envelopes containing heroin, a quantity of cocaine, a loaded .38 caliber handgun and ammunition, other narcotics paraphernalia, and approximately $27,000 in cash. Subsequent laboratory analysis revealed that 347.4 grams of heroin and 51.3 grams

of cocaine had been seized.

However, the indictment was drafted before the lab analysis and mistakenly charged that one kilogram of heroin was involved in the conspiracy. Prior to trial, the government informed the court and the defense that it would not attempt to prove that more then [sic] one kilogram of heroin was involved in either the conspiracy or the substantive offense. After a request by both the government and Navarro's counsel to strike from the indictment references to the quantity of heroin involved, Judge Duffy reserved judgment.

Nevertheless, in his charge to the jury, Judge Duffy read verbatim from the indictment, including the reference to a kilogram of heroin. Neither party objected.

Section 841(a)(1) provides that "it shall be unlawful for any persons knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1). Proof of a particular quantity of narcotics is not an element of a Section 841(a) substantive charge or of a conspiracy charge under Section 846 of Title 21. United States v. Macklin, 927 F.2d 1272, 1276 (2d Cir.), cert. denied, 112 S. Ct. 146 (1991); United States v. Campuzano, 905 F.2d 677, 679 (2d Cir.), cert. denied, 111 S. Ct. 363 (1990). The evidence was thus sufficient to support the conviction.

Navarro next argues that he was prejudiced by the reference to a

particular quantity in the jury instructions. Navarro, however, did not object to the instructions as required by Fed. R. Crim. P. 30. He is thus barred from raising this issue on appeal unless it involves plain error. See United States v. Maniktala, 934 F.2d 25, 29-30 (2d Cir. 1991). Navarro argues that jurors were compelled by the instruction to find a particular quantity of heroin and thus must have considered Pena's testimony as to the quantities of drugs he perceived to be in Navarro's apartment at the time of Pena's original visit. Both steps of this analysis are highly implausible. The claimed error thus does not go to "the very essence of the case" and is not plain error. Id. at 29 (quoting United States v. Smith, 918 F.2d 1032, 1038 (2d Cir. 1990)).

Hon. Ralph K. Winter, U.S.C.J.

Hon. Roger J. Miner, U.S.C.J.

Hon. Joseph M. McLaughlin, U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.